TABLE OF CONTENTS

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
STATEMENT	2
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	7
APPENDIX A—OPINION OF THE COURT OF APPEALS	1a

TABLE OF AUTHORITIES

CASES:

Bruton v. *United States*, 391 U.S. 123 (1968) 4, 5, 6
Close v. *United States*, 450 F.2d 152 (4th Cir. 1971) .. 6
Delli Paoli v. *United States*, 352 U.S. 232 (1957) 4, 5
Dutton v. *Evans*, 400 U.S. 74 (1970) 5
Krulewitch v. *United States*, 336 U.S. 440 (1949) 4, 5
Sibbach v. *Wilson & Co.*, 312 U.S. 1 (1941) 6
United Brotherhood of Carpenters & Joiners v. *United States*, 330 U.S. 395 (1947) 6
United States v. *Jones*, 402 F.2d 851 (2d Cir. 1968) ... 6
United States v. *Lyon*, 397 F.2d 505 (7th Cir. 1968) ... 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No.

SIMON BRACH, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner SIMON BRACH prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, which affirmed a judgment of conviction rendered against petitioner in the United States District Court for the Eastern District of New York on March 3, 1972, for unlawful possession of stolen goods (18 U.S.C. § 659) and unlawful sale of stolen goods (18 U.S.C. § 2315), said goods having moved as part of a foreign shipment.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit, reprinted as Appendix A *infra*, is not yet reported.

JURISDICTION

The judgment of the United States Court of Appeals is dated July 25, 1972. Mr. Justice Marshall entered a timely order extending the time to file this petition to and including September 23, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the admission, over petitioner's timely objection, of an extrajudicial statement made by petitioner's nontestifying codefendant violated petitioner's right under the Sixth Amendment to confront witnesses against him where that statement constituted the only evidence linking petitioner with the codefendant's alleged theft of the merchandise involved in petitioner's conviction.

STATEMENT

Petitioner was named in an indictment along with his stepfather Ishak Fried, his mother Zali Fried, and one Aaron Schatten, charging conspiracy and substantive offenses involving the theft and sale of stereos stolen from a pier in Brooklyn. Petitioner was convicted on Counts 2 and 3 of the indictment and was sentenced to three years' imprisonment and four years' probation.

The proof showed generally that some 589 cartons of Unisonic stereos had been fraudulently taken from the pier on October 22 and 23, 1970, by a trucker claiming to act on behalf of the consignee. Evidence was presented in the form of an identification by a pier employee and the testimony of a handwriting expert tending to establish that defendant Schatten was the man who drove the truck and

picked up the stereos. There was also evidence that some of those stereos had been delivered by an independent trucker to one William Hendler in Philadelphia, after a telephone offer by Mrs. Fried. The packages delivered to Hendler bore a fictional name and address.

Count 3 was based on the sale of stereos to Joseph Levy, who owned a small retail store in New York City. Levy testified he had been offered 100 of the stereos at a bargain price by Mr. Fried and that they were delivered by petitioner's truck on November 3, 1970. Petitioner was a trucker who occasionally was employed by Mr. Fried to transport goods for the Fried Trading Company, owned by Mr. and Mrs. Fried. Levy said that a receipt was signed by him and given to the petitioner, who was present at the delivery. Fred Mele, a New York City policeman, testified that he had driven the truck for the petitioner and had unloaded the cartons at Levy's stock room. The stereos were seized by agents from the Waterfront Commission later the same day, and a carton taken from the hallway outside Levy's stock room was identified as similar to the cartons containing the stolen merchandise.

Michael Downey, an F.B.I. agent, testified that he had arrested Schatten and interviewed him after his arrest. Counsel for petitioner (and Schatten's counsel) objected to any testimony concerning what Schatten had told the agent at the time of the arrest. A side-bar conference then took place, at which time the prosecutor informed the judge that he wanted to elicit Schatten's statement that he knew the petitioner. Petitioner's objection was overruled (Trial transcript, pp. 977-978). The prosecutor then asked, "Did Mr. Schatten say he knew Mr. Brach?" Agent Downey replied, "Yes, he did." (Transcript, p. 979). No limiting instructions were given as to this testimony.

At the close of the evidence, all defendants moved for a directed verdict of acquittal for failure of proof. In dismissing the conspiracy count, the prosecutor argued that

the other defendants "couldn't sell the property, your Honor, of course, without Mr. Schatten, because he stole it." The trial judge responded: "You may have a question there, Mr. Puccio. The only link-up you have is that he said he knew Brach." The motions were denied. (Transcript, p. 1264).

The jury failed to reach a verdict on any counts as to Mr. Fried or as to Schatten, but convicted Mrs. Fried and the petitioner on Counts 2 and 3. The Court of Appeals affirmed the conviction of the petitioner on both counts, rejecting the petitioner's arguments that the evidence was insufficient to support the verdict and that the trial court erred in admitting certain hearsay testimony.

REASONS FOR GRANTING THE WRIT

1. The conviction of the petitioner based upon the extrajudicial statement of a nontestifying codefendant plainly violated not only this Court's decision in *Bruton* v. *United States,* 391 U.S. 123 (1968), but also its decisions in *Delli Paoli* v. *United States,* 352 U.S. 232 (1957), and *Krulewitch* v. *United States,* 336 U.S. 440 (1949).

The critical issue at petitioner's trial was whether he had any knowledge that the stereos he delivered to Levy were stolen merchandise. The prosecution completely failed to adduce any competent evidence linking petitioner with the theft of the stereos from the pier, and the other evidence relied upon by the Court of Appeals—his family relationship to the Frieds, the fact that he did not get an invoice from or send a bill to Levy, and the fact that he used an off-duty policeman to drive the delivery truck—was, to say the least, consistent with his total innocence.

In this context, the testimony of Agent Downey as to the extrajudicial statement of petitioner's codefendant Schatten was critical to the prosecution's case. Schatten was the only defendant—indeed, the only person at all—whom the prosecution connected to the actual theft. Thus, any con-

nection between Schatten and the petitioner would undoubtedly have carried great weight with the jury in supporting an inference that the petitioner knew the stereos were stolen. And as the trial judge himself remarked, the "only link-up" between Schatten and the petitioner was Agent Downey's testimony that Schatten had "said he knew Brach". (Transcript p. 1264).

This testimony was patent hearsay, and under no rule of law was it admissible against the petitioner. *Compare Dutton* v. *Evans,* 400 U.S. 74, 86 (1970). And because the statement by a nontestifying codefendant added "substantial, perhaps even critical, weight to the Government's case," *Bruton* v. *United States,* 391 U.S. 123, 128 (1968), its admission over petitioner's objection violated petitioner's rights under the Confrontation Clause of the Sixth Amendment.

In *Bruton,* a codefendant's confession that incriminated the defendant was admitted with an instruction to the jury that it could be considered as evidence only against the codefendant. This Court held that such statements carried such a "risk of prejudice" that "in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination." 391 U.S., at 135, 137.

The holding in *Bruton* would compel reversal of the petitioner's conviction here, but indeed the admission of the challenged testimony was erroneous even under pre-*Bruton* law, for the trial court did not give an instruction to the jury that Schatten's statement was admissible only as to him. Thus, even under the rules of *Delli Paoli* v. *United States,* 352 U.S. 232 (1957), and *Krulewitch* v. *United States,* 336 U.S. 440 (1949), holding that extrajudicial statements of a nontestifying codefendant may be admitted if a limiting instruction is given (*Delli Paoli*) or if they are declarations in furtherance of a conspiracy (*Krulewitch*), the admission of Agent Downey's testimony was erroneous.

Recent cases in the Courts of Appeals have held the admission of statements by non-testifying codefendants under similar circumstances to violate the confrontation clause even when limiting instructions have been given. In *United States* v. *Jones*, 402 F. 2d 851 (2d Cir. 1968), a critical issue in the appellant's perjury trial was whether he had knowledge of an affidavit of his codefendant Mittelman. At trial, the grand jury testimony of Mittelman, who did not testify at trial, was put in evidence. The court held that this was error under *Bruton*, in light of the fact that "the most persuasive, if not indeed the sole evidence of Jones' knowledge of Mittelman's affidavit was Mittelman's grand jury testimony." 402 F. 2d, at 851. See also *Close* v. *United States*, 450 F. 2d 152, 154 (4th Cir. 1971) (codefendant's statements were "a vital part in the proof"); *United States* v. *Lyon*, 397 F. 2d 505, 510 (7th Cir. 1968) (codefendant's admissions implicated appellant as a partner in the prostitution enterprise).

2. Under these circumstances, the petitioner's failure to assign the admission of the challenged testimony as error in the Court of Appeals does not bar review by this Court. See *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 16 (1941), holding that the Court will notice "fundamental error" even though not raised in the Court of Appeals. See also *United Brotherhood of Carpenters & Joiners* v. *United States*, 330 U.S. 395, 412 (1947). The error in this case was of such a fundamental dimension, affecting the basic right of the petitioner not to be convicted on unsworn and untested evidence, that this Court should grant a writ of certiorari and reverse the judgment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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APPENDIX

APPENDIX

Opinion

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 823—September Term, 1971

(Argued June 15, 1972 Decided July 25, 1972.)

Docket No. 72-1295

UNITED STATES OF AMERICA, *Appellee,*

v.

ZALI FRIED and SIMON BRACH, *Appellants.*

Before: KAUFMAN, HAYS and OAKES, *Circuit Judges.*

OAKES, *Circuit Judge:*

Appellants Fried and Brach, mother and son, appeal from convictions on one count of unlawful possession, 18 U.S.C. § 659, and one count of unlawful sale, 18 U.S.C. § 2315, of "Unisonic" AM-FM stereos moving as part of or constituting a foreign shipment of freight. Each appellant was convicted on both counts, but the jury was unable to agree on a theft count (18 U.S.C. § 659) and a conspiracy count (18 U.S.C. § 371) against appellants, or on counts against appellant Fried's husband, Ishak, and one Aaron Schatten. Some 589 cartons, each containing two sets of the Japanese eight-track stereo units—valued at over $62,000 in terms of the importer's cost—were stolen on October 22 and 23, 1970, from Pier 21 in Brooklyn, while consigned to the sole American importer, North American Foreign Trading Corporation ("North American"). The theft was discovered on October 26, and within weeks three separate quantities of the missing stereos were found, in the hands of a New York City retailer, Joseph Levy, a Philadelphia wholesaler, William Hendler, and retailers who had purchased sets from a Pennsylvania wholesaler, Carl Beddo.

Of the 85 stereo units seized from an Orchard Street loft in Manhattan from Levy, at least 82 bore serial numbers falling within the range of serial numbers for the missing units. Only one shipping carton was found at Levy's, and that in the hallway immediately outside the storeroom. Twenty-two units were seized from Hendler along with ten empty cartons; of these, 20 units and eight cartons bore stolen serial numbers. Six units were taken from purchasers from Beddo, of which five bore numbers within the indicated range. Not insignificantly, all of the units seized from Levy and Hendler and at least half of those seized from customers of Beddo were sold by people connected with Fried Trading Co., a Brooklyn firm owned by appellant Zali Fried and her husband, and employing appellant Brach as a trucker.

While appellants dispute the sufficiency of the evidence, there were ample facts to support their convictions. On October 28, 1970, according to Hendler, Mrs. Fried called him and sold him over the telephone "a couple of dozen" of the stereos at only $5.00 per unit above North American's cost and a full $7.00 below North American's lowest selling price to retailers. Curiously, Hendler received no bill or invoice from the Frieds when the units were delivered a few days later, and the shipping label on the cartons referred to a supposed Manhattan company—the "G & S Trading Co."—that was later shown to be fictitious. Appellant Brach disclaims knowledge that the stereos he delivered to Levy had been stolen, suggesting that it was coincidence that he had Levy's 100 stereo units delivered in a truck driven by a part-time New York City policeman, who was "moonlighting" for Brach's trucking business. But no invoice or bill was received for these units either, and Brach retained the receipt for the goods he had Levy sign. Beddo purchased his stereos over-the-tailgate, so to speak, out of a parked truck at the Fried place of business from one of the younger Fried sons. It remains a bit of a

mystery how Fried Trading Co. people in late October 1970 became Unisonic purveyors, for nobody connected with Unisonic or North American ever sold stereos to the Frieds or their firm. A footnote is that the Fried Trading Co. does import Japanese stereos, but these are brand-named "Granada" and not "Unisonic."

It may be that, giving appellants the benefit of the doubt, the evidence against appellants is circumstantial because not all of the stereos and cartons seized fit the range of serial numbers on the bill of lading for the stolen stereos or because there is nothing to match each stereo unit to a carton. So is most evidence, however, upon close analysis, and when stereos with the same serial numbers as the missing units in 80 or 90 per cent of the cases, and cartons with the same numbers in several instances are sold by a business that has never bought them, at a price a little lower than the usual wholesale price, and without the customary invoicing, the inference that can be drawn by a rational trier of fact is not very remote. To appellate judges who review records, it is difficult to see how any other inference could be drawn in this case.

While there was no direct evidence connecting appellant Fried with the Levy sale, in light of her participation in the Hendler sale and her activity in a managerial capacity in the family business operation, *see Nye & Nissen* v. *United States*, 336 U.S. 613, 619-20 (1949), and in light of what was a sound and fair aiding and abetting charge, she was properly found guilty on the Levy sale count. *Cf. United States* v. *Callahan*, 439 F.2d 852, 861-62 (2d Cir.), *cert. denied*, 404 U.S. 826 (1971).

Brach's knowledge that the Levy stereos had been stolen was also proven inferentially only, but it was proven—not merely because the goods his trucking concern delivered were stolen or by his relationship to his mother as a Fried Co. owner, but also by the unusual circumstances of his delivery of $5,000 worth of stereos without a bill or an

invoice and by the use of a part-time police officer for delivery purposes, thereby removing Brach himself from transportation of the stolen goods, although he was on hand at Levy's at the time of delivery. *Cf. United States* v. *Edwards,* 366 F.2d 853, 867 (2d Cir. 1966), *cert. denied,* 386 U.S. 908 (1967) ("surreptitious and furtive" transfers of stock in bars and lavatories for fraction of face value circumstantial evidence of theft and knowledge that stock was stolen). Even if this evidence were not enough standing alone, " '[p]ossession of the fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession, and, though only *prima facie* evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence.' " *United States* v. *Minieri,* 303 F.2d 550, 554 (2d Cir.), *cert. denied,* 371 U.S. 847 (1962), *quoting Wilson* v. *United States,* 162 U.S. 613, 619 (1896). In light of the circumstances just recited, Brach's failure to offer any explanation is fatal to his claim of innocent possession.

Appellant Fried claims prejudice from the testimony of two witnesses. One, Levy, volunteered, not responsively, that Ishak Fried's brother had told him, "It's better to be in jail than to be dead." Upon prompt objection this testimony, however, was stricken and the jury instructed to disregard it; its obvious impropriety as hearsay cannot be deemed of such lasting or permeative influence as to be prejudicial in any real sense of the word. Our regard for the jury system is too high to warrant a view that duly stricken testimony of this nature would be given credence or, if given credence, would influence the verdict.

The other witness, FBI Agent Michael Downey, testified that only a month or so before the Unisonic stereos were missed from Pier 21 he had found at the Fried place of business a carton of men's jackets also stolen from a Brooklyn pier. This testimony could not properly have

been elicited in the Government's direct case to show a probability that the defendants committed the charged crime because they were of bad character, *United States* v. *Bozza*, 365 F.2d 206, 213 (2d Cir. 1966), and even though it might have gone to the issue of guilty knowledge or intent, *see United States* v. *Deaton*, 381 F.2d 114, 117-18 (2d Cir. 1967), and authorities cited therein, it was not so limited after proper and timely objection. The testimony was, however, produced only on rebuttal, after Ishak Fried had testified, on cross-examination to be sure, that he could not recall any previous seizure of new merchandise but that he had had on the premises shoes, old clothing and dresses for distribution to the poor through his yeshiva. Thus it did go toward his credibility. That the admission of this testimony, even if erroneous as being hearsay, was not prejudicial may be inferred from Ishak Fried's acquittal in this 9-day trial. The evidence against Zali Fried was more than enough to justify a conclusion that admission of Downey's testimony was harmless.

Finally, the argument that the carton found in the hallway of Levy's loft was not admissible is grasping at straws. While the hallway may have been used by other tenants, the Waterfront Commission agent who found the carton discovered it just outside the Levy door, which in turn was "isolated by itself. . . ." With a veritable treasure trove of pirated eight-track units inside the loft, absent their cartons, and proof of the sale of cartons and stereos by the Frieds to Levy, the inference that a carton located outside an isolated door in the hallway might have come from Levy's by way of the Frieds is not, we think, altogether unwarranted or unjustified.

Judgment affirmed.